

The Great Repeal Bill and the Charter of Fundamental Rights – not a promising start

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Daniel Sarmiento Fr 31 Mrz 2017

One of the messages that the UK government has repeated since the decision of the British people to leave the EU, is that the withdrawal will not entail a loss of any right, particularly of social rights. This was (and is) an important part of the message, considering the high turnout of labour voters that voted for Brexit.

Yesterday the Government published an insightful White Paper on the upcoming Great Repeal Bill, which will incorporate most of EU Law into UK Law once Brexit takes place, in order to provide stability and legal certainty to citizens and undertakings currently living and working in the UK. In Chapter 2, the White Paper makes a reference to the hundreds of thousands of EU acts that will be incorporated and stresses the importance of providing stability in the legal framework once Brexit happens. EU Law will carry on being applicable, but only as UK Law, and reforms will be introduced into this “repatriated EU Law” from then onwards by both Parliament and Government.

Therefore, on the day Brexit happens EU Law will be incorporated into the UK legal system, including the entirety of the Court of Justice’s case-law. This is a huge digestion of rules and judicial rulings, unprecedented in the way and speed in which it will take place.

However, there is a piece of EU Law that will not be incorporated into UK Law. This is no ordinary or irrelevant piece. It is the Charter of Fundamental Rights of the European Union. It is another revealing sign of the impact that Brexit will have in the UK and, above all, for UK citizens and their rights.

The Government’s White Paper justifies the decision to exclude the Charter from the Great Repeal Bill with an argument so simple that it is, in fact, incorrect. I very much doubt that the UK Government incurred in a clerical error when drafting the text, so I assume that the justification is simply the best effort they could do. In the Government’s own words, “the Charter was not designed to create any new rights or alter the circumstances in which individuals could rely on fundamental rights to challenge the actions of the EU Institutions or member states in relation to EU Law.” The document carries on and claims that “the Charter was intended to make the rights that already existed in EU law more visible by bringing them together in a single document”.

I might be missing something, but the Charter, besides codifying some fundamental rights already recognized in the case-law of the Court of Justice, introduced many new rights and principles of enormous relevance and inexistent under EU Law until the entry into force of the Charter in 2009.

Thanks to the Charter, EU Law recognizes the prohibition of human cloning as part of the fundamental right to physical integrity (article 2.2.d). There is nothing in EU secondary law on schools, but the Charter enshrines the freedom to found educational establishments (article 14.3). And there is a very important right conferred on nationals of non-EU Member States that are authorized to work in the EU: the right to working conditions equivalent to those of citizens of the Union (article 15.3).

In an aging society in which we will live longer than any other previous generation, the Charter recognizes the rights of the elderly “to lead a life of dignity and independence and to participate in social and cultural life”. Many of the elderly in Britain voted for Brexit. This fundamental right has been deprived from them.

The effect is even more brutal when it comes to vulnerable groups, as is the case of persons with disabilities. Article 26 of the Charter recognizes the right of persons with disabilities “to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. This right under

the Charter will be gone after Brexit.

The Government's document is even more striking when it adds that "the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK". This assertion is made on the assumption that EU secondary law suffices to keep all the rights untouched. But this claim is wrong, and it can be easily proved with an example.

In *Kušionová*, the Court of Justice was faced with an unfair term in a consumer credit contract, in which the guaranteed asset was the consumer's home. When she faced the risk of an eviction and loss of her home, Mrs. Kušionová argued that the fundamental right to accommodation, as recognized in article 7 of the Charter, protected the consumer from procedures of enforcement that would entail her eviction, the auction of the property and, as a result, the loss of her home. The Court of Justice agreed and ruled that the enforcement could not carry on as a result of the Directive 93/13 (which says nothing about extrajudicial enforcements), as interpreted in light of the Charter. By relying on the Charter, the Court of Justice interpreted Directive 93/13 in a way that created a new provision, a rule of judicial creation, coherent with the Directive 93/13, but not included by the legislature in the articles of the legal text.

With the Great Repeal Bill, Mrs. Kušionová's case would still apply in the UK because Directive 93/13 and the UK implementing legislation will be interpreted in light of the Court of Justice's pre-Brexit case-law. And the judgment in *Kušionová* was rendered in 2014, so it will remain as part of UK law.

However, this will not be the case when it comes to interpret the 2014 Mortgage Credit Directive, which has not been interpreted yet by the Court of Justice (and will not be interpreted before Brexit). This Directive will be incorporated into UK Law as a result of the Great Repeal Bill, but it will be introduced with no case-law of the Court of Justice attached to it. Therefore, the right to protect the consumer's home will be ensured when the substantial applicable rules are those under Directive 93/13 (*Kušionová*), but the consumer will be left all alone, in the hands of internal UK Law, when the same risk appears but the consumer can only rely on the Mortgage Credit Directive.

It is true that the Charter can only apply in Member States when there is another rule of EU Law at stake. But all EU lawyers know that the Charter is not only an interpretative tool for the application of EU Laws, but also a source of creation of new jurisprudential rules, closely attached to the EU rules governing the case. *Kušionová* is a good example of how the system works. It is also a good example of how unfair and regressive the Great Repeal Bill will be for millions of right-holders in the UK, particularly for the most vulnerable communities and individuals.

As every day goes by, we understand better what "take back control" means. In the area of fundamental rights, it means a lot. And the prospects are not very good for right-holders, despite the promises of the happy Brexiteers to keep rights untouched.

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